Supreme Court, U.S.
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No. 91-1832

# In the Supreme Court of the United States

OCTOBER TERM, 1991

ANTON TITTJUNG, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner's service as an armed guard at a Nazi concentration camp rendered him ineligible for a visa under the Displaced Persons Act of 1948.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The order of the court of appeals (Pet. App. 7-9) is unreported, but the judgment is noted at 948 F.2d 1292 (Table). The opinion of the district court (Pet. App. 12-37) is reported at 753 F. Supp. 251.

### JURISDICTION

The judgment of the court of appeals was entered on November 15, 1991. A petition for rehearing was denied on January 8, 1992. Pet. App. 10-11. The petition for a writ of certiorari was filed on April 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner was born in Erdud, Yugoslavia, in 1924. In October 1942, he joined the Waffen-SS, a military force of the Nazi German government.[1] He remained in the Waffen-SS until the conclusion of the war in 1945. Petitioner was a member of the Totenkopf-Sturmbann (Death's Head Battalion). The Death's Head Battalion was a district organization within the Waffen-SS, and was responsible for the operation of the Mauthausen concentration camp complex. The Mauthausen concentration camp complex included Mauthausen concentration camp and the subcamp of Gross Raming. It was established and operated by Nazi Germany in Nazi-occupied Austria. Petitioner served as an armed guard at the Mauthausen concentration camp complex. He wore the insignia of the Death's Head Battalion, a skull and crossbones, on his uniform. In July 1944, he was stationed at Gross Raming. Pet. App. 15-19.

Thousands of prisoners died at Mauthausen as the result of shooting, gassing, electrocution, starvation, forced labor, lethal injection, and other forms of killing. During the period of petitioner's service, the death toll at Mauthausen ranged from 200 to 400 per day. At Gross Raming, 185 prisoners were killed during the period of petitioner's service. People were imprisoned in the Mauthausen concentration camp system because of their race, religion, national origin, or political opinion. Among those incarcerated at Mauthausen and Gross Raming were Russian, British, and American prisoners of war; political opponents of the Nazis, including citizens of Yugoslavia,

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[1] The district court found that there was "strong support for the Government's position that [petitioner] voluntarily joined the Waffen-SS." Pet. App. 16 n.2.

Poland, the Soviet Union, Spain, and many other European countries; and Jews. Pet. App. 20-22.

Guards at Mauthausen and Gross Raming were issued uniforms, paid a stipend, armed with rifles or submachine guns, and were under orders to shoot at any prisoner attempting to escape. The duties of guards, such as petitioner, at Mauthausen and Gross Raming included guarding prisoners to ensure that they performed forced labor and did not escape from the labor site; guarding prisoners on forced marches from the main camp to subcamps; and guarding prisoners from the camp perimeter and its watchtowers to ensure that they did not escape. The district court concluded that, while performing such guard duties, members of the Death's Head Battalion "ordered, incited, assisted, and generally participated in the persecution of prisoners." Pet. App. 20. Such persecution included "forcible confinement, slave labor, deprivation, physical and emotional abuse, torture, and extermination." *Ibid.*; see also *id.* at 19-20, 35.

2. In February 1952, after living in Austria for several years following the war, petitioner applied to immigrate to the United States as a "displaced person" under the Displaced Persons Act (DPA).[2] At no point during the immigration process did peti-

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[2] The DPA, ch. 647, 62 Stat. 1009 (1948), as amended by Act of June 16, 1950, ch. 262, 64 Stat. 219, was enacted to permit European refugees driven from their homelands by the war to immigrate to the United States. It established an elaborate system of interviews for determining who was an eligible "displaced person." Those who had assisted in persecuting civilians were specifically excluded from the definition of "displaced person" under the DPA. Pet. App. 22-23, quoting *Fedorenko* v. *United States*, 449 U.S. 490, 495 (1981).

tioner disclose to United States officials that he had been a member of the Death's Head Battalion or had served as a concentration camp guard. In fact—in response to a question regarding his military service—petitioner claimed that he had been a member of the Prinz Eugen Division of the Waffen-SS and had fought against the Tito partisans between early 1943 and late 1944, retreating to the Austria-Yugoslavia border in May 1945. Based upon petitioner's representations, he was certified as a displaced person eligible for a visa. In April 1952, upon entering the United States, petitioner swore under oath that he had never assisted in the persecution of any person because of race, religion, or national origin. Pet. App. 22-26.

On November 2, 1973, petitioner applied for naturalization. Question 7 of the application form required him to list membership in every "organization, association, * * * or similar group, and foreign military service." Petitioner claimed military service in the German Army, but he did not indicate that he had served in the SS Death's Head Battalion or as an armed guard at Mauthausen or Gross Raming. On January 9, 1974, petitioner was naturalized as a United States citizen. Pet. App. 27-28.

3. On September 1, 1989, the government brought suit under Section 340(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1451(a) (1982), to revoke petitioner's citizenship. After a three-day trial, at which petitioner offered no evidence or testimony, the district court found that as a result of his service as an armed guard at the Mauthausen concentration camp system, petitioner was ineligible for a visa under the DPA, which prohibited granting a visa to "any person who * * * assisted in the perse-

cution of any person because of race, religion, or national origin." § 11, 64 Stat. 227. The court therefore held that petitioner's citizenship was illegally procured because he was not lawfully admitted with a valid visa, as required by Section 316(a)(1) of the INA, 8 U.S.C. 1427(a)(1), and that he should be denaturalized. Pet. App. 12-37.

The district court concluded that authentic documentary evidence convincingly established petitioner's guard service. The court based that conclusion on expert testimony, an analysis of a Gross Raming guard roster bearing petitioner's name and other identifying information, and the examination of other documents. The court rejected petitioner's arguments that the guard roster had not been adequately authenticated, that the government was required to offer eyewitness testimony to establish that he had served as a guard, and that the government had not met its burden of proof in relying on expert testimony regarding the nature of guard duty at Mauthausen and Gross Raming. Pet. App. 12-13, 30-37.[3]

4. The court of appeals affirmed the judgment of the district court without opinion.

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[3] The government's complaint also included eight other grounds for denaturalization, such as willful misrepresentation and concealment, false testimony, membership in a movement hostile to the United States, and acquiescence in conduct contrary to civilization and human decency. In light of its finding that petitioner had illegally procured his visa under the DPA, the court found it unnecessary to address the other counts. Pet. App. 37.

## ARGUMENT

Petitioner contends (Pet. 2-6) that the decision in this case affirming the district court's denaturalization order conflicts with a decision of another court of appeals. Contrary to that contention, the decision in this case is governed by this Court's ruling in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), and does not conflict with the decision of any other court.

1. In *Fedorenko*, this Court reviewed an order revoking the citizenship of a person who had entered the United States by procuring a DPA visa through misrepresentation. There, as here, the individual whose citizenship was revoked had lied, when applying for the visa, to conceal the fact that he had been an armed guard at a Nazi concentration camp. 449 U.S. at 496-497, 507-510. This Court held that his citizenship was properly revoked because the misrepresentation was a material one, in that "an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa" under the DPA.[4] *Id.* at 512. The Court further held that the conduct of such a guard "who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting

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[4] The Court noted that the DPA's definition of "displaced persons" who were eligible to immigrate to this country excluded persons who had "assisted the enemy in persecuting civil populations." § 2(b), 62 Stat. 1009, incorporating the definition of "displaced person" found in Annex I to the Constitution of the International Refugee Organization of the United Nations, § 2(a), 62 Stat. 3051-3052. *Fedorenko*, 449 U.S. at 495.

at escaping inmates on orders from the commandant of the camp, fits within the statutory" definition of assisting in the persecution of civilians. *Id.* at 512-513 n.34.

The district court correctly determined that, in light of this Court's decision in *Fedorenko*, petitioner's visa was illegally procured under the DPA and his citizenship was therefore subject to revocation. Petitioner was a member of the Death's Head Battalion and served as a concentration camp guard at Mauthausen and Gross Raming. Pet. App. 23-25. The district court noted that *Fedorenko* had interpreted the DPA to require that "all concentration camp guards were ineligible as a matter of law for visas because they had assisted in the type of persecution proscribed by the DPA." *Id.* at 34. The court also noted that "[p]risoners were persecuted and killed because of race, religion, or national origin at Gross Raming," *id.* at 35, and that petitioner's service as an armed guard there rendered him ineligible for a DPA visa, regardless of whether his service was voluntary or involuntary, and regardless of whether eyewitnesses had attested to his personal involvement in persecution, *id.* at 36. In those circumstances, the court correctly held that it was "bound to reach the same conclusion that the Supreme Court reached in *Fedorenko*," *id.* at 35, and that, because petitioner was ineligible for a visa, his certificate of naturalization must be revoked, *id.* at 36-37.

Every court of appeals that has decided a denaturalization case regarding an armed Nazi concentration camp guard has followed *Fedorenko* in holding that guard service constitutes "assistance in persecution" and disqualifies the guard from citizenship. *United States* v. *Linnas*, 685 F.2d 427 (2d Cir.), cert.

denied, 459 U.S. 883 (1932); *United States* v. *Demjanjuk*, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982); *United States* v. *Schmidt*, 923 F.2d 1253 (7th Cir.), cert. denied, 112 S. Ct. 331 (1991); *United States* v. *Kairys*, 782 F.2d 1374 (7th Cir.), cert. denied, 476 U.S. 1153 (1986); *United States* v. *Schellong*, 717 F.2d 329 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984).

2. Petitioner errs (Pet. 2) in claiming that the decision in this case conflicts with *Petkiewytsch* v. *INS*, 945 F.2d 871 (6th Cir. 1991). That case did not involve the eligibility of a concentration camp guard for a DPA visa. Rather, the issue was "whether a permanent resident alien who served involuntarily as a civilian guard in a German 'labor education camp' during the period of Nazi control and who never personally abused prisoners is subject to deportation" under the Holtzman Amendment to the INA, Pub. L. No. 95-549, §§ 101-105, 92 Stat. 2065-2066 (1978). 945 F.2d at 872.

The Holtzman Amendment, which was codified as Section 241(a)(19) of the INA, 8 U.S.C. 1251(a)(19) (1988),[5] provides that an alien shall be deported if he acted under the direction of or in association with the Nazi government and "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion." Based on its analysis of the legislative history, the court of appeals in *Petkiewytsch* distinguished the Holtzman Amendment from the DPA and concluded that the Holtzman Amendment

[5] Section 241(a)(19) of the INA has been recodified by Section 602 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5077, and now appears as Section 241(a)(4)(D), to be codified at 8 U.S.C. 1251(a)(4)(D).

requires a "more searching" inquiry than the DPA into whether the alien had engaged in persecution.[6] After distinguishing the facts of the case before it from those in *Fedorenko*, the court concluded that deporting Petkiewytsch "would not further the goal of the Holtzman Amendment and would carry out no discernible policy of the United States." 945 F.2d at 881.

*Petkiewytsch* has no application here. The court of appeals in *Petkiewytsch* recognized that its gloss on the Holtzman Amendment would not be applicable to the DPA, which this Court authoritatively construed in *Fedorenko*. See 945 F.2d at 880. Because this case involves the DPA, not the Holtzman Amendment, there is no conflict on the issue presented by petitioner.[7]

In any event, the facts of *Petkiewytsch* are quite different from those in this case. The Sixth Circuit noted that Petkiewytsch was "at all times a reluctant civilian guard" who had been imprisoned for failing to perform his duties diligently; that he served in one of "the least punitive of all types of Nazi camps";

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[6] The court of appeals reached that conclusion because it believed that the Holtzman Amendment was designed "at least in part, to accomplish a different purpose" from the DPA, 945 F.2d at 879, and that language in the legislative history "appears to require active participation in persecution beyond 'assistance.'" *Id.* at 880.

[7] We believe that, in construing the Holtzman Amendment, the Sixth Circuit in *Petkiewytsch* relied on a misreading of the legislative history. In that respect, the Sixth Circuit's decision in *Petkiewytsch* is contrary to the conclusion of the Seventh Circuit in *Schellong*, 805 F.2d at 661, where that court found that "[t]he purposes of the two statutes [the Holtzman Amendment and the Displaced Persons Act] were identical." That issue, however, is not presented in this case.

that he served under "duress," never shot at any prisoners, and never personally engaged in acts of persecution; and that he had been "completely exonerated" by British authorities after the war. 945 F.2d at 881. The court therefore concluded that Petkiewytsch did not fit the profile of an armed concentration camp guard that was before this Court in *Fedorenko*. Here, in contrast, petitioner was an armed military guard of the SS; there was "strong support" in the record for the conclusion that petitioner "voluntarily joined the Waffen-SS" (Pet. App. 16 n.2); the concentration camps where petitioner served were the focus of persecution that "included, but was not limited to forcible confinement, slave labor, deprivation, physical and emotional abuse, torture, and exterminations"; and there is no evidence or finding that petitioner was exonerated for his concentration camp guard service. *Id.* at 20. Petitioner, therefore, would not prevail under the approach applied in *Petkiewytsch*.[8]

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[8] Nor is there a conflict between this case and *Laipenieks* v. *INS*, 750 F.2d 1427 (9th Cir. 1985). See Pet. 3-4. That case, like *Petkiewytsch*, concerned the Holtzman Amendment, not the DPA, and it involved a Latvian civilian police officer, not a concentration camp guard. Moreover, the holding of *Laipenieks* turned on the court's interpretation of the requirement that persecution be based on race, religion, national origin, or political opinion; the court held that the government failed to carry its burden of proving that Laipenieks' victims were persecuted because of their political beliefs, rather than for some other, unproscribed reasons. 750 F.2d at 1437.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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